Decision of the Homeowner Housing Committee issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012

Hohp Ref: HOHP/PF/15/0103 & 0104

Re: Properties at Broomhill Court, Stirling, FK9 5AF (collectively "the Property")

The Parties:-

Mrs AG Smith, 16 Craiglea Road, Perth, PH1 1LA ("the applicant")

Hacking & Paterson Management Services, 1 Newton Terrace, Charing Cross, Glasgow, G3 7PL ("the respondent")

Decision by a Committee of the Homeowner Housing Panel in an application under section 17 of the Property Factors (Scotland) Act 2011

Committee Members:

Maurice O'Carroll (Chairman); Tom Keenan (Housing Member)

Decision of the Committee

The Committee finds that the respondent has failed to carry out its property factor's in terms of section 17(1)(a) of the 2011 Act.

The decision is unanimous.

Background

1. By application dated 6 July 2015, the applicant applied to the Homeowner Housing Panel for a determination of whether the respondent had failed to comply with the property factor's duties imposed by section 17(1)(a) of the 2011 Act, which is to say property factors duties generally. There was no complaint in respect of the Code of Conduct under section 14(5) of the 2011 Act.

2. By letter dated 19 February, a Convenor on behalf of the President of the Homeowner Panel intimated a decision to refer the application to a Homeowner Housing Committee. A Notice of Referral was subsequently served on both parties.

3. Following service of the Notice of Referral, representations were received from the respondents which resulted in a Directions being issued on 21 March 2016 requiring further specification of the applicant's complaints by reference to correspondence lodged and intimated to the respondent.

4. Further to that Direction, the applicant produced a letter dated 5 April 2016 providing further detail of the claim. Following observations made by the respondent on 19 April 2016, the applicant submitted further submissions dated 8 May 2016 and a paginated list of documents which she supplied in hard copy format in a ring binder at the hearing.

5. The applicant had previously intimated a list of complaints to the respondent by letter dated 10 June 2015 further to her obligation under section 17(3) of the Act. The submissions dated 8 May 2016 were agreed to be a re-statement of the issues set out in the letter of 10 June 2015, albeit in greater detail and by specific reference to correspondence.

6. A hearing was held at Wallace House, Maxwell Place, Stirling 11 May 2016. The applicants appeared on her own and gave evidence on her own behalf. The respondent appeared and was represented by Mr David Doran, one of their directors, who gave evidence on its behalf. Both parties were asked questions by the Committee members in relation to points made by the opposing party in the course of correspondence and also arising from the evidence given at the hearing itself. The Committee considered each of the witnesses to be credible and reliable, who gave their evidence in a measured and unexaggerated manner.

7. The applicant's complaints under the application fell under numerous headings as set out in the response to the Direction and the letter of 10 June 2015, some of which were inter-related. For the purposes of this decision, these have been grouped together as follows:

(i) Failure to ensure that common areas are properly maintained and kept clean to a reasonable standard;
(ii) Failure to ensure that repairs and maintenance (such as paintwork) are carried out timeously and properly using the most appropriate contractor;
(iii) Failure to respond to requests for information in relation to fire safety checks;
(iv) Failure to monitor the work of contractors to ensure that they are doing the jobs they are supposed to do and that jobs are properly complete.

Committee Findings

8. The applicant is the joint heritable proprietor (along with her husband) of flats 11 and 21 of the property known as and forming Broomhill Court, Stirling, FK9 5AF.

Flat 11 is registered in the Land Register under title number STG52607 and forms a third floor flat within the overall block development known as 1-25 Broomhill Court. Flat 21 is a second floor flat registered in the land register under title number STG51771 and is part of that same block development ("the development"). The same real burdens and common obligations apply to both flats in terms of the title deeds.

9. The respondent is the property factor responsible for the repair and maintenance of the common parts of 24 flats comprising the block development mentioned in the preceding paragraph. Their responsibilities for those common parts are as set out in a Deed of Declaration of Conditions registered on 24 February 2004 by Stewart Milne Group who were responsible for creating the development including the Property.

10. The most recent Written Statement of Service supplied to the applicant is the respondent's Terms of Service and Delivery Standards dated 22 October 2012. It is applicable to the common parts of the Property and forms the contractual basis of the property management services which are supplied by the respondent as factor the applicant as homeowner.

11. The respondent is a registered property factor (as of 1 November 2012) and has been responsible for the management of the Property at all relevant times mentioned in the applicant's submissions.

12. The jurisdiction of the Committee to entertain the complaints in relation to factor's duties arises from the date of 1 October 2012.

The legal context

13. The relevant part of the Deed of Conditions discussed in evidence is Clause 8 entitled "Maintenance of Flats" and provides as follows in relevant part:

'Each proprietor shall be bound to uphold and maintain good order and repair and decoration the whole subjects conveyed to him...and also the common property and in the event of failure to do so said maintenance in so far as relating to external appearance may be carried out on our instructions or those of the Property Manager with right of reimbursement for expenses against the proprietor or proprietors...
declaring that except with our prior written consent, the external painting and staining and other external treatment shall be maintained in the original colour and no proprietor shall be permitted to paint any external wood work, metal work or other render or outside walls a different shade or colour from the original shade or colour. It is specifically provided that within three years hereof and no later than three years thereafter the Property Manager on behalf of the proprietors shall if deemed necessary paint such of the entrance halls, passages, stairs or landings etc. and of the outside wood work, metal work or other external

render of the blocks as are usually painted or otherwise treated the same as specified by the Property Manager or shall stain, grain, oil and varnish such portions of the outside as are stained, grained, oiled or varnished in a proper and workmanlike manner and further in the event of the proprietors failing to agree to such painting, the painting shall be carried out to the specification of the Property Manager with right of reimbursement for expenses against the proprietors..."

14. The other contractual document between the parties is the Written Statement of Services ("WSoS") dated 22 October 2012, which provides in relevant part as follows (using the numbering in the WSoS):

'Hacking and Paterson Management Services (HPMS) as Factor for the Property offer the following Core Factoring Services to the co-proprietors (homeowners) relative to the land/property which homeowners share in common and/or responsibility (common property):-

2. Arranging and administering maintenance of common property by appointing contractors and service suppliers.
3. Arranging and administering maintenance, where appropriate, of landscaped areas, play parks, woodland areas etc. by appointing contractors and service suppliers.
4. Entering into contracts with contractors and service suppliers.
5. Investigating complaints of inadequate work or service from contractors and service suppliers and pursuing them to remedy these.
6. Checking contractors' and service suppliers' invoices when rendered and apportioning the cost due by each homeowner...
8. Dealing with homeowners' communications and enquiries...
11. Attending the property periodically (these visits can be arranged to suit homeowners).
12. Advising on maintenance and repair, redecoration and improvements, where it may be considered necessary.
13. Attending periodic and annual general meetings of homeowners *and tendering advice and guidance on property factoring issues*' (italics added).

15. On page 2 of the WSoS, certain additional services are narrated which may be provided on request at an additional cost to be agreed with homeowners prior to commencement. These include 'assisting with items of maintenance/repair/decoration etc considered to be of a substantial nature' and 'implementing planning maintenance schemes for common property.'

16. Under the heading "Notes on Services" it is stated at the second bullet point that 'HPMS appoint contractors and service suppliers which they believe are qualified and suitable to carry out common works and services.' At the 12th bullet point it is stated that 'HPMS expect homeowners to notify HPMS promptly of common property requiring maintenance, repair or attention. This should be done either in writing (including electronically) by telephone or in

person at their office, specifying the details of the property and matter requiring attention.'

17. The terms of the Deed of Conditions make it clear that the obligation to maintain the common parts of the development falls on the proprietors within the relevant properties. The factors are empowered as property managers to carry out those obligations on the proprietors' behalf and thereafter to seek reimbursement from them for any expenses incurred in doing. The factors therefore act as agents of the proprietors in the maintenance of the common parts of the property. They charge a factoring fee for providing those services. The agency arrangement may therefore also be characterised as a non-gratuitous one.

18. Other than the contractual provisions between the parties noted above, the relationship between the parties is also governed by the common law of agency which arises independently of those provisions. In relation to the core services, the agency is of a general nature, which is to say not in relation to specific individual instructions, but as part of a general discretion to deal with those matters described as core services. The operation of general agency is informed by usage in trade. In other words, it is relevant to consider the standards and practices that are applied by the general body of property factors in carrying out those functions.

19. In carrying out their functions as property factors, the respondent required to exercise ordinary or reasonable skill and care. This has been expressed by an institutional writer as follows: in non-gratuitous agency, an agent "is obliged to act with that diligence and discretion which a man of prudence uses in his affairs." (Erskine, Institute, III, 3, 37).

Findings in relation the alleged failures

20. (i) *Failure to ensure maintenance and cleaning of common areas*
The applicant referred to the minutes of a co-owners' meeting held on 15 May 2014. Seven owners representing 8 properties (out of a possible 24) were present, together with two of the respondent's directors. A number of issues were raised including stair cleaning; fire safety checks; the removal of an external tap at the bin store; use of local contractors; use of inappropriate contractors; the common stair carpet; painting and cleaning services generally. There was an undertaking made at that meeting by the respondent to investigate outstanding issues. Correspondence between the applicant and respondent ensued but the follow-up inspection by the respondent was not carried out until over a year later on 15 June 2015. Despite that, the applicant stated no satisfactory changes were in fact effected. The inspection followed the applicant's formal letter of complaint dated 10 June 2015. In his response to that letter dated 16 June 2015, Mr Kingham for the respondent accepted that certain matters required to be remedied. Photographs taken at the site

inspection the previous day were provided which supported the unsatisfactory condition of the common parts of the development.

21. The applicant considered that the cleaning of the stairwell and other common parts was sporadic. Credits in respect of this had been provided by the respondent in quarterly statements (such as occurred in August 2015) but this was not the approach she wanted. The better approach in her view would be to ensure that cleaning was carried out regularly from Monday to Friday and properly recorded in the cleaning sheets completed by the cleaners. These were sometimes completed in respect of three days at once and then left blank for extended periods. As a result, for example, the stair carpet had not been properly vacuum cleaned meaning that dirt had become engrained, whereas regular cleaning would have avoided that occurring in the first place. Alternatively, where cleaning was unsatisfactory, the cleaner should have been required to go back and redo the cleaning job properly. This failure was reported in the letter of 10 June 2015 but had not been remedied within a reasonable period of time. Due to its sporadic performance, greater detail or specification regarding the cleaning contractor had been sought from the respondent but this had not been provided until November 2015.

22. In response, Mr Doran pointed out that at the homeowners' meeting, the 8 properties represented did not constitute a majority and decisions required to be made on behalf of all homeowners. In order to engage all homeowners, letters such as the one dated 22 September 2014 (bundle, page 14) had been sent out but a majority had not responded suggesting an alternative contractor that could be engaged. As a result, nothing could be done at that time. Ultimately, a new cleaning contract was arranged with one of the proprietors who undertook to carry out the service. That arrangement is now working well and work is being carried out to a satisfactory standard, with the only problem remaining being fly tipping and leaving rubbish by the bin stores as shown by the photographs produced by the factors in their letter of 16 June 2015.

23. Mr Doran also referred to the letter to all homeowners dated 20 January 2015. That referred to only 7 responses being received regarding a change of cleaning contractor and to the failure of the contractor to complete visit sheets. That had resulted in the credit referred to by the applicant being credited to homeowners. He further stated that there was no issue regarding the standard of cleaning, only the failure to complete the visit sheets as had been identified in September 2014 (bundle page 14). However, he accepted that the errors pointed out to them at that time regarding cleaning invoices had prompted the respondents to seek an alternative provider. The Committee noted that a deep clean had been carried out prior the commencement of the current cleaning arrangements at no cost to the homeowners (letter of 16 July 2015, bundle page 29). That would tend to suggest that the standard of routine cleaning prior to that date had not in fact been satisfactory.

24. The Committee considered that the terms of the title deeds placed an obligation on the factors to act on behalf of the homeowners to independently ensure that the common areas were kept clean and tidy. As noted above, there is a clear obligation on homeowners to maintain common areas in good order and repair. That obligation devolved to the factors as their general agents. It followed that in the view of the Committee, where it was apparent that common areas were not being so maintained, the respondent was under a duty to undertake reasonable steps to ensure that the position was rectified.

25. In the view of the Committee, there is no requirement in the title deeds for the respondent to wait until an overall majority of homeowners voted in favour of an alternative specified cleaning contractor before an admittedly unsatisfactory situation was rectified (following the site inspection on 15 June 2015 and as shown by the deep clean undertaken at the respondent's own expense). Doing so unnecessarily produced a paralysis whereby the situation was permitted to continue without resolution for an inordinate period of time which caused considerable inconvenience to the applicant. This view is supported by the fact that the respondent's WSoS specifically provides for additional services over and above the core services which by their nature require *agreement with the homeowners prior to commencement.* The core services by contrast have no such proviso.

26. Further, the failure to take action was contrary to the duty contained in point 1 of the core services and point 8. The undertaking in point 8 to deal with homeowners' communications and enquiries carries with it an implicit undertaking that the respondent will do so within a reasonable period of time. The cleaning contractor arrangements now appear to be working successfully. However, the time taken to get to that stage was in the view of the Committee inordinately lengthy. Concerns were first raised regarding cleaning arrangements in May 2014 (although claimed by Mr Kingham to be satisfactory at that time). The unsatisfactory nature of cleaning services were raised by the applicant in June 2015. Further complaints were sent by the applicant in the interim and repeated by letter dated 24 June 2015 from the applicant. Details of the contract, referred to as "specification" in the meeting of 15 May 2014, were not supplied until November 2015. Matters have only been resolved in relation to cleaning arrangements recently after numerous and persistent complaints by the applicant. It therefore finds the respondent to have failed in their factor duties in relation to the inordinate time taken to resolve this issue.

27. (ii) *Failure to ensure that repairs and maintenance are carried out timeously and properly using the most appropriate contractor*

This issue mainly related to the painting of the common parts of the development. Mr Doran pointed to the letter to homeowners dated 28 July 2014 at page 8 of the bundle which provided details of two painters selected to carry out painting works to the front entrances of both blocks of the development. That letter required homeowners to make a choice between the two and return a payment mandate.

A chaser was sent on 25 September 2014 (bundle page 15) as there had been a lack of response. At page 21 of the bundle is a letter dated 26 February 2015 adding details of an additional contractor (Ian Thomson) who would apply an undercoat and gloss paint, rather than staining, at the suggestion of the applicant. At page 29, the respondent's letter to the homeowners dated 16 July 2015 indicates a readiness to proceed with the work. At page 31 of the bundle, an email from Mr Kingham to the applicant indicated that Mr Thomson would not be carrying out the painting works after all (having declined to accept the respondent's terms and conditions) and another three contractors would be requested to provide an estimate. The email between the same two parties dated 24 February 2016 confirmed that the painting works had been completed satisfactorily. The work had been carried out on 2 September 2015 which Mr Doran accepted in evidence was an unduly long period of time and that the work should not have taken over a year to carry out. The Committee agreed with that statement.

28. The applicant's complaint was that much time was taken up with instructing the wrong work to be carried out in the first place. The second half of Clause 8 of the Deed of Conditions which provides that common parts are to be repainted every three years in the same manner as they are usually treated. Since the entry doors had previously been painted in undercoat and gloss paint, any such renewal should be the same. In the letter of 28 July 2014, homeowners were given quotes for staining of the wood rather than repainting. As that was the cheaper option, it was the one selected by the majority of homeowners who responded. However, that option should never have been provided standing the terms of the Deed of Conditions and the respondent ought to have been aware of that. Ultimately, the correct finish was applied to the entrance doors but only as a result of the applicant's intervention.

29. Mr Doran did not accept that the finish originally proposed was contrary to the terms of the Deed of Conditions. He also stated that it was not the duty of the respondent as property factor to understand the difference between the two types of finish, whether staining or gloss paint. If additional expertise was required to make that decision then they as factors would appoint a person with that additional expertise. Put more baldly, he stated that it was not the role of the factor to provide any knowledge at all: their role was merely to facilitate the obtaining of such knowledge as was necessary to carry out such common works as were required.

30. The Committee had some difficulty with that assertion. It does not accord with the common law duties of an agent to act with ordinary care and to exercise the same prudence as they would in their own affairs. Self-evidently, factors will require some degree of skill and knowledge as a starting point in order to arrange for work to be done. Otherwise, they would be unable to enquire as to what further knowledge or expertise was necessary. Put another way, if complete corporate ignorance on the part of the factor is to be assumed, then

they would not know to employ a gardener to tend an untidy garden or a roofer to mend a leaking roof. That position would be somewhat absurd.

31. In a letter from Mr Gifford to the applicant dated 9 October 2014, the following was stated at page 61 of the bundle: "Property management, or factoring, is by its nature a job involving the instruction of many trades and services and we act as agents on behalf of the homeowners. We do not ourselves have the necessary skills, experience and training in each and every trade or specialism...However notwithstanding the above our own experience does enable us to analyse and question contractors and to seek clarification where required and of course we have in-house surveyors who we can call upon if required." It struck the Committee that such a statement was closer to the correct position. Apart from work which could be described a truly specialist, for example fire safety requirements, it could reasonably be expected that the respondent as factors would have the necessary expertise and experience to deal with frequently occurring maintenance issues such as painting and cleaning themselves without the need for recourse to additional guidance.

32. Further, the Committee disagreed with the submission that the original proposal to stain the entrance doorway rather than re-paint it with gloss paint was not contrary to the terms of the Deed of Conditions. It agreed with the applicant's interpretation. The respondents as agents under that contract ought to have been aware of the terms of the Deed of Conditions and to have acted upon it from the outset. The Committee therefore finds that the respondent failed in its duties under this heading in relation to the painting issue.

33. Ultimately, the correct treatment of the entrance door was applied but only after a year and after the intervention of the applicant. These factors evidently caused her some considerable irritation and inconvenience. It agreed with her submission that the respondent did not act in accordance with points 12 and 13 of the WSoS to advise on redecoration where necessary and to tender advice and guidance on property factoring issues. In questioning of Mr Doran by the applicant, he accepted as much. When asked who within his organisation knows about decoration, maintenance and repair, his answer was no-one and that any expertise for those matters requires to be brought in, the factors role being merely to facilitate that.

34. Other issues under this general heading were also the source of complaint. These were set out at page 3 of the applicant's submissions where it was stated that instead of the respondent identifying common problems, homeowners were being charged for contractors to go to the development in order to tell the respondent what type of contractor they needed. Examples of this were an electrician was instructed to fix a problem with a key not turning in a lock and on another occasion when a door required to be adjusted as the lock was not lining up with the door frame. Another example was an external tap being replaced at a cost which the applicant considered to be greatly in excess of what was reasonable. The issue of

inappropriate contractors being used was dismissed as requiring no further action by the respondent by letter dated 30 May 2014 (page 58 bundle). On another occasion, a fire safety company called ASCO originally attended as a window repair had been reported to it is being for a fire window (page 69 bundle, letter of 16 June 2015). Having checked the fire windows, ASCO then re-attended to advise that the window in question was an ordinary window which would not close and that a joiner was required. On the same page of that letter, Mr Kingham for the respondent pointed out that although Marshall Construction were called out to carry out a lock repair, they were able to provide a suitable tradesman who carried out a satisfactory repair despite not being a locksmith. He also pointed to difficulty in obtaining suitable tradesman in the Stirling area.

35. In evidence, Mr Doran explained that it is common for the respondent to use multi-task companies and that it is not necessary, for example, for a specialist locksmith to repair a lock. He also explained that a contractor called Graham Robertson who was an electrician could competently carry out a joinery job. The full description of that firm was in fact Graham Robertson Electrical and Security so that it was appropriate for it to deal with a door entry system as referred to by the applicant.

36. The Committee understood the applicant's concerns regarding the contractors employed by the respondent and the impression she was under that (a) they were not the most appropriate or (b) the cheapest. However, with the exception of the fire safety checks which are dealt with below, the Committee found that the works were indeed carried out satisfactorily. Further, the respondent's explanation as to why certain multi-task tradesmen were used, rather than specific tradesmen, and the dearth of suitable tradesmen within the Stirling area was accepted by the Committee. It therefore did not find that the respondent had failed in its factor duties in relation to these other matters. Having said that, it did consider that it would be helpful and more transparent for the respondent to explain in its regular communications with homeowners why particular tradespeople had been used for repairs and maintenance carried out, in particular where certain choices might not seem particularly obvious (e.g. where a construction company or electrician repairs a door lock) or apparently the cheapest.

37. (iii) *Failure to respond to requests for information in relation to fire safety checks*
It should be noted that fire safety checks are not specifically mentioned in the core services section of the WSoS. However, it appears clear from the correspondence before the Committee that the responsibility for dealing with this matter was accepted by the respondent. The applicant expressed frustration at not being able to obtain like-for-like quotations for different contractors to carry out the necessary work. The current position is that ASCO carries out the work at present (bundle, pages 18, 73 and 74), having taken over from a company called Lambert Contracts. According to the applicant, the homeowners had not received satisfactory answers at that time as to when the changeover had been

instructed and had taken place, the date next safety check was due and why wet/dry riser checks had taken place in July and then October of the same year.

38. Further, homeowners had not been provided with quotes for different companies who could do (1) wet/dry riser testing; (2) check emergency lighting and (3) check smoke vents. A different quote from Stirling Electrical did not cover the same matters as had been priced by ASCO with the result that the homeowners could not be sure that they had obtained the most competitive quote. The applicant also complained that the respondent did not appear to know how often such checks should be carried out. This she stated was contrary to their core service provision at point 13 of the WSoS.

39. Mr Doran responded by stating that the fire checks referred to are covered by guidance known to the contractors involved, rather than specific statutory provisions. He also accepted that the frequency of testing and content of the quotes provided to homeowners was different in each case so that a direct comparison could not be made. He stated that in relation to the other complaints, the frequency of the checks was a matter for the contractor to determine and that the respondent as factor was not able to provide the level and detail of advice as sought by the applicant and homeowners.

40. As noted above, the Committee accepted that the issue of fire safety checks could not be described as run of the mill and their frequency was not a matter of statutory requirement. To that extent, the provision of such services were specialist and not the expertise which could normally be expected of a factor. However, it could be expected that they could arrange to provide like for like quotes that could be considered by the body of homeowners to whom that service was a matter of obvious concern. Also, further to the statement made by Mr Gifford referred to above, it might be thought that inspections if carried out in July and October of the same year might have caused the respondent to "analyse and question contractors and to seek clarification" as stated by him in the letter of 9 October 2014. The Committee therefore found that the respondent failed to comply with its duty as factor under this head.

41. (iv) *Failure to monitor the work of contractors*

Mr Doran submitted that the respondent had no duty to inspect any work carried out by contractors and service suppliers. He stated that contractors' word that work has been carried out is taken on trust and that no monitoring is included within the core services. Any inspection which is carried out, as was done on numerous occasions in respect of this particular development, is only ever reactive and as a result of complaints received. The requirement to check invoices at point 5 of the core services is only to check that they are authentic and that they are numerically correct, such as by the inclusion of VAT. It is observed above that in the WSoS notes on services, the respondent expects homeowners to notify them promptly of common repairs requiring maintenance, repair or attention. This is supported by the core factoring service at point 8

which requires to respondent to deal with homeowners' communications and enquiries.

42 However, point 4 of the core factoring services refers to "Investigating claims of inadequate work or service from contractors and service suppliers and pursuing them to remedy these." The Committee considered that there was a general duty to inspect which is to be subsumed under that particular heading.

43. Moreover, in terms of point 11 of the core services the respondent specifically undertakes to "attend the property periodically." If not to inspect, then one must ask for what purpose? Whilst there must be some obligation on responsible homeowners to report defects and matters requiring maintenance from time to time, this does not absolve the respondent as factors from their obligations. Their obligations are to act on behalf of the homeowners to ensure that the common parts of the development are maintained as the latter are obliged to do in terms of the title deeds. If the respondent had no obligation whatever to carry out inspections to ensure that cleaning or other maintenance work was being carried out as instructed, then core service 11 would be devoid of meaning. The Committee did not consider that this would be a reasonable interpretation of that part of the WSoS.

44. Incidentally, the obligation to inspect and verify the work of contractors would in the view of the Committee also extend to verifying invoices to ensure that the charges for services were accurate and did not entail excessive costs to the homeowners who are ultimately responsible for paying them.

45. The Committee was satisfied that in relation to all of the various points of complaint brought by the applicant, action had only ever been taken as a result of her persistent and determined complaining to the respondent. In the experience of the Committee, other reasonable property factors do undertake inspections of properties for which they are responsible in order to ensure that contractors are fulfilling the work required of them and, where appropriate, to check that work instructed is carried out properly. That is a function which a reasonably prudent homeowner could be expected to carry out if they were in the position of maintaining the property in question themselves. The respondent by its own admission does not carry out any such a function. The respondent as agent is in the shoes of the homeowners. It ought to carry out that function.

46. It is not for the Committee to stipulate the frequency of inspection or monitoring for any given works. There is at common law only the general duty to take reasonable or ordinary care in the exercise of the respondent's function as noted above. For this reason, no specific order in this regard is included in the Property Factor Enforcement Order. However, reasonable care would tend to suggest periodic inspection to check the state of the garden (at relevant points of the year such as spring and autumn), the standard of cleaning every few months and any repairing or repainting jobs that might be required at the same time. It

might also suggest that specific jobs should be checked upon completion, especially if they were the subject of complaint or required to be re-done following complaint. Frequency and timing (as suggested within point 11 of the core service itself) might perhaps best be a matter of separate informal agreement between the respondent and the homeowners. Any such issues as do arise, should be dealt with within a reasonable timescale. The Committee was not satisfied that the issues outlined by the applicant at the hearing were dealt with sufficiently timeously by the respondent.

Decision

47. For the reasons stated, the Committee finds that the respondent has failed in its factor duties under s 17(1)(a) of the 2011 Act under heads (i)-(iv) to the extent referred to above.

48. In accordance with s 19(3) of the 2011 Act, having been satisfied that the respondent has failed to carry out the property factor duties, the Committee must make a Property Factor Enforcement Order ("PFEO"). That Order is provided separately to this decision.

49. In relation to heads (i) and (ii), the Committee notes that the matters covered have now been completed so that a specific requirement under the Order is not necessary. As noted above, it is not appropriate for the Committee to make a specific requirement in relation to head (iv). The requirements of the PFEO will therefore only relate to compensation for the inconvenience caused by the respondent's failure to comply with their factor duties and their failure to obtain comparable quotes under head (iii) of complaint.

50. **Appeals**

The parties' attention is drawn to the terms of s 22 of the 2011 Act regarding their right to appeal and the time limit for doing so. It provides "(1) An appeal on a point of law only may be made by summary application to the Sheriff against a decision of the president of the Homeowner Housing Panel or a Homeowner Housing Committee; (2) An appeal under subsection (1) must be made within the period of 21 days beginning with the date on which the decision appealed against is made..."

Signed M O'Carroll
Chairman

Date 1 June 2016